

# Legal But Rare: Toward a Transformative Critical Theory of Abortion and Unwanted Pregnancy

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**ABSTRACT:** This paper argues that it is not incoherent to think that abortion should be “legal but rare.” The argument draws upon virtue ethics, feminism, critical theory, and the theory of biopolitics to argue that the idea that abortion should be legal but rare is best understood as aiming at the elimination of unwanted pregnancies. Some pro-choice defenders of abortion rights worry that the “legal but rare” idea stigmatizes women who choose abortion. But when this idea is unpacked using the tools of intersectional analysis, biopolitical theory, and virtue ethics it can be understood as pointing toward a transformation of social reality that empowers women.

**KEYWORDS:** abortion, pregnancy, feminism, intersectionality, critical theory, virtue ethics, moral luck

If abortion is permissible does it make sense to say that it should also be rare? Perhaps the idea that abortion should be “legal but rare” is incoherent. If early abortion is permitted, it might seem that there is nothing wrong with it and thus that there is no need to stipulate that there should be fewer abortions. I will restrict my discussion to the case of early (first trimester) abortions, since there is broad consensus that early abortion should be legally permissible (so when I use the term “abortion” in what follows, I am only focusing on early abortion).<sup>1</sup> This claim about consensus is, of course, not a persuasive argument about the permissibility of early abortion. The consensus could be wrong, after all. And indeed, the legal permissibility of early abortion established under *Roe v. Wade* and other Supreme Court precedents is currently being challenged by new abortion restrictions in states such as Alabama, Georgia, and Missouri. Nonetheless, the current consensus seems to be that early abortion should be *legally* permissible.<sup>2</sup> It is, obviously, more difficult to establish a clear *moral* consensus about abortion. So for the sake of argument here, I merely stipulate that early abortion is morally and legally permissible. But if abortion is morally and legally permissible, then why should it be rare?

At one point in American history, abortion was neither illegal nor rare.<sup>3</sup> But the “legal but rare” position has become a sort of default position advocated by a number of pro-choice politicians. In the 1990s Bill Clinton claimed that abortion should be “safe, legal, and rare.”<sup>4</sup> Hillary Clinton reiterated this idea in a speech from 2006, where she said: “Let us unite around a common goal of reducing the amount of abortions.”<sup>5</sup> Barack Obama expressed the same idea in a number of places.<sup>6</sup> Even philosophical defenders of abortion rights open the door to moral judgment that limits abortion despite its permissibility. Mary Anne Warren, for example, claims, “There may well be something immoral, and not just imprudent, about wantonly destroying potential people, when doing so isn’t necessary to protect anyone’s rights.”<sup>7</sup> Although Warren is pro-choice and although she denies that fetuses are persons who have rights, she does admit that there is something wrong about wanton destruction. A related caveat can be found in Judith Jarvis Thomson’s suggestion that some abortions may be “indecent.”<sup>8</sup>

These caveats and limitations may seem to create an incoherent position. But I argue here that the idea that abortion should be legal and rare is not incoherent. I conclude that the best way to understand the idea that abortion should be “legal but rare” is to understand it in terms of *reducing unwanted pregnancies* such that women are less often confronted with the tragic abortion choice. To say that the abortion choice is tragic is not to say that it is impermissible or wrong. A tragic choice occurs when there are conflicting goods.<sup>9</sup> Abortion is a tragic choice because it occurs in the context of an unwanted pregnancy. Unwanted pregnancies are less than optimal. The best-case scenario would be that women who get pregnant actually want to be pregnant and carry their pregnancies to term. It is less than optimal to have an unwanted pregnancy. Therefore, rather than trying to prohibit abortion, the primary focal point for thinking about the frequency or rate of abortions should be finding ways to prevent unwanted pregnancies.

This means that the conversation about abortion must include discussions of contraception, sexual education, and gender/sexual politics. The abortion decision occurs only after there have been prior opportunities to avoid an unwanted pregnancy. The crucial focus for those who want abortion to be “legal but rare” is the question of why there are unwanted pregnancies and what steps might be taken to avoid those. I will suggest in what follows that there is often an issue of “moral luck” involved in unwanted pregnancies—as in the case of failed contraception, disabled fetuses, rape, incest, and so on. Of course, one might object that unwanted pregnancies occur due to a lack of responsibility on the part of women (and men) who have unprotected sex.<sup>10</sup> One solution is to encourage sexual moderation and control of desire. This is an approach that fits well with the tradition of virtue ethics, which I refer to in what follows. Traditional virtue ethics makes sexual continence a matter of personal self-control. But an account of virtue that is informed by contemporary gender theory and the theory of biopolitics will offer a more critical and complicated account. The point is not merely to encourage women (and men) to control their desires but also to transform the way we think about sex, gender, and reproduction.

## THE ABORTION RATE

The rate of abortion in the United States is declining.<sup>11</sup> For those who want abortion to be “legal but rare” this would seem to be a good thing, provided that the declining abortion rate is not the result of coercion or attempts to prevent abortion that violate women’s rights.<sup>12</sup> If there is nothing wrong with abortion, however, then it might seem that, other things being equal, the decline in abortion rates is a matter of moral indifference. But it is not controversial to claim that it is a good thing that there are fewer *unwanted pregnancies*. And abortion is only really a choice when a pregnancy is unwanted. The reduction in unwanted pregnancies should provide a source for establishing common ground between pro-choice and pro-life points of view.

But one wonders whether the idea that abortion should be “legal but rare” is a coherent position. If abortion is legal, this implies that it is permissible. But why should a permissible action be rare? A related question occurs that has to do with serial abortions or what is colloquially called “abortion as birth control.” People will often say that they are pro-choice but do not want women to employ abortion as birth control; and even pro-choice advocates can be critical of women who have multiple abortions. These sorts of judgment seem inconsistent. If the abortion choice is permitted, then it would seemingly not matter how many abortions a woman chooses to have; nor should we care about “wanton” destruction of fetuses (as Warren put it) or “indecent” abortions (as Thomson put it). While this paper focuses primarily on the question of the frequency of abortions across the population (i.e., the rate of abortion), many of its arguments will also apply to our thinking about serial abortions and related questions about what is “wanton” or “indecent.”<sup>13</sup>

There are two moral considerations at play in thinking about the issue of “legal but rare.” On the one hand, there is the consideration of what is permissible. *Permissibility* draws a clear line dividing what is permitted (or what we have a right to do) from what is wrong. But on the other hand, the question of *frequency* focuses on judgments about what transpires in the realm of the permissible. The question of what should be done rarely or frequently is a matter that is best answered by thinking that is informed by virtue ethics and also by the much larger vantage point of what we might call “transformative critical theory.” This is the vantage point afforded, for example, by theories such as feminism or pacifism, which are interested in imagining ways of transforming the world in order to create human flourishing.<sup>14</sup> From the vantage point of transformative critical theory, the problem is not only about abortion; rather it is more generally about unwanted pregnancy. From the vantage point of virtue ethics, as I am employing it here, the question is not about insisting on sexual purity as a matter of individual effort. Rather, the issue of concern for a critical reconstruction of virtue ethics is how the social and educational system can help prevent unwanted pregnancy. This is not a matter of sexual purity for women, as a traditional male-dominant account of virtue might emphasize; rather, the point is for men to also develop virtuous sexuality and to create a social world in which birth control and sexual education help to minimize unwanted pregnancy. To say that abortion should be

legal is to stipulate that it is permissible and not wrong. But to say that it should be rare asks us to look beyond the permissibility of abortion to the larger set of circumstances in which unwanted pregnancies occur.

Now it might be that politicians and others who claim that abortion should be legal but rare are merely pandering or ashamed to admit what they truly believe. Perhaps they really think there is nothing whatsoever wrong with abortion and are not really bothered by the number of abortions that occur. They thus throw in the idea that abortion should be rare as a way of making their pro-choice perspective more palatable to those who are on the fence about abortion. That could be the case. But I suspect that many of the politicians who articulate the “legal but rare” idea are sincere. And at any rate, this paper is not primarily focused on political rhetoric. Rather, I begin with the political rhetoric to show that the idea that abortion should be legal but rare has entered the mainstream of discussions about abortion.

This idea is not without its critics. In a recent book defending abortion rights, Ann Furedi explains, “Society wants abortion to be legal and safe, but rare; used when needed, but not needed; available but stigmatized; right to provide, but wrong to use.”<sup>15</sup> Furedi argues that the idea that abortion should be legal but rare contains implicit condemnation of abortion that fails to fully support a woman’s right to choose. This objection is important and helps frame the problem. Can one consistently claim that abortion is permissible while also claiming that it is not optimal?

A defense of the idea that abortion should be rare is not intended to stigmatize women who choose to have abortions—as Furedi might suggest. Rather, it is intended to distinguish between the question of what is permissible (or what one has a right to do), and the transformative concerns of a comprehensive critical theory. Those concerns extend beyond the question of what we are permitted to do or prohibited from doing. They direct our attention to the task of transforming the larger social situation.

## MORAL LUCK, BIOPOLITICS, AND TRANSFORMATIVE THEORY

One traditional source for an approach that aims at a comprehensive and transformative theory can be found in virtue ethics. The virtue tradition asks us to consider what counts for an excellent or happy life, in the sense of Greek *eudaimonia*. This tradition also reminds us of the importance of social systems and moral education. The virtue tradition grounds an answer to the question of excellence and *eudaimonia* in claims about human potentialities. Clearly pregnancy begins in the reproductive potentiality of the female body. It is connected to the process or experience of what Arendt calls “natality”; but reproduction and abortion occur within a larger context that could be understood in terms of “biopolitics.”<sup>16</sup> There is something natural and normal about conception, pregnancy, and birth, as part of a teleological process that can be analyzed from the perspective of virtue ethics; but there is also a whole system of bio-power that regulates this process, gives it meaning, and which calls for analysis from the vantage point of critical social and political theory.<sup>17</sup> Virtue ethics is concerned with questions about the

right time, manner, and amount of a given action as well as questions about habits, character, and dispositions; those questions are answered by considering teleological processes that actualize potentialities. However, human life and its teleological processes are not merely “natural”; human life is embedded in social and political relations and systems of power. Transformative and critical theories are interested in those larger systems and how they can be used to either hinder or maximize human potential and eudaimonia; such theories also help us imagine ways to reconstitute social and political life in order to overcome impediments to human flourishing. Transformative and critical theories are also sensitive to the complexity of social circumstances that is exposed by intersectional analysis. There are some difficulties in attempting to bring virtue theory together with the critical lens of biopolitics, transformative critical theory, and intersectionality—since virtue theory is often understood as being grounded in a philosophically untenable naturalism that has traditionally devalued women. But it is possible to imagine a feminist virtue ethics.<sup>18</sup> Abortion discussions can be enlightened by intersectional analysis.<sup>19</sup> And there is also an affinity between Foucault’s biopolitical idea and the virtue tradition.<sup>20</sup>

A longer exposition would explore the complexities of these theoretical frameworks. But let’s proceed by reasserting the importance of natality. Birth is natural and reproduction is usually a good thing. But it is also possible that pregnancy and reproduction happen at the wrong time or in the wrong manner—say when the mother is raped or ill or too young. The virtue tradition is interested in judgments about time and manner. Indeed, virtue ethics asks about the totality of the circumstances that make up a life and helps human beings maximize their potential. Furthermore, the virtue tradition reminds us that a perfect life is an impossibility. We are each confronted with tragic choices. To claim that it would be better if abortion were rare is not to claim that abortion is a wrong choice or that it should be illegal; rather it is to point out that the abortion choice arises in tragic circumstances as a result of the bad moral luck that leads to an unwanted pregnancy and reproduction that does not optimize human excellence or result in eudaimonia.

Something like this has been discussed by Hilde Lindemann who states, “pregnancies are valuable, and . . . in ending them, something of value is lost, even when other goods are gained.”<sup>21</sup> Lindemann focuses our attention on the value of pregnancy and how that is related to the status of the fetus; she also offers a useful overview of the varieties of moral luck as discussed by Nagel, Walker, Williams, and Card.<sup>22</sup> I will not recount this literature here; nor will I venture into the weeds of the varieties of moral luck; nor will I recount the details of virtue theories—ancient and modern. Rather I will assume the reader has some familiarity with the complex and extensive background theory of moral luck and how it plays a role in thinking about virtue ethics.<sup>23</sup>

But we should pause here to also draw an explicit connection with the concerns of feminism. Hildemann’s account, for example, hits upon the connection between moral luck and male dominance and patriarchal oppression. This helps us understand a feminist response to the so-called “responsibility objection.”<sup>24</sup> Sexual responsibility occurs within a system that constructs sexual desire and behavior.

So-called “irresponsible” sex is not only the fault of women who choose to have unprotected sex. Rather, that behavior occurs within a biopolitical situation in which the sexual choices and activities of women (and men) are shaped by social frameworks that normalize (or stigmatize). For example, sexual desire and behavior is shaped by norms of beauty, pornography and advertising, popular culture, religious discourses, and socially constructed norms of female and male libido.

One significant way to make abortion rare would be to empower women. If female responsibility is an issue, then we ought transform our sex and gender system in a way that supports women (and men) to be more responsible about the reproductive potential of vaginal sex. The way forward is to focus on finding ways to change the surrounding biopolitical circumstances such that the bad luck that leads to abortion occurs less frequently. One of the most important shifts that needs to occur is to empower women to control their own sexual and reproductive lives. This claim is offered in solidarity with feminist theories informed by Foucaultian biopolitics. But a similar conclusion could also be derived from a feminist virtue ethics: virtue ethics gives us a reason to think that women in a male-dominant society are prevented from achieving eudaimonia. So we find wisdom about abortion and reproductive ethics in a combined approach that weaves together themes from feminist thought, virtue ethics, and transformative critical theories such as the theory of biopolitics.

The basic point is that moral judgment should attend to the totality of the social circumstances in which choices are made. Aristotle tells us that virtue depends upon the good luck of being born into a good city, having good social status and good friends; it also depends upon living long, having good health, and so on. Foucault reminds us that the concepts we have of bodies, reproduction, pregnancy, and the like are informed by structures of biopower. Feminists teach us that women have historically suffered from a systematic deprivation of many of the very things that make for a good life in Aristotle’s sense—including especially the capacity to control their own reproductive lives. This can be described, as Claudia Card does, as “female moral luck in a misogynist society.”<sup>25</sup> The larger question is whether women are afforded equal opportunities for living a virtuous life or whether in fact it is bad luck for a woman to be born into a patriarchal culture in which gender oppression includes lack of reproductive self-control.

It is the bad luck of an unwanted pregnancy that leads to abortion. It may be odd to suggest that abortion is the result of reproductive bad luck. And pro-life critics of abortion may dig in here and stipulate that conception is never bad—and that even an unwanted pregnancy should be seen as a blessing.<sup>26</sup> But we have already assumed in this paper that early abortion is permissible, so let’s leave this concern aside. Instead, let’s reiterate that the question of abortion arises in circumstances that are best understood in terms of the general category of bad luck: rape (although we must be careful here and point out that rape is evil and not merely bad luck), failed birth control or lack of access to (or knowledge of) birth control, poverty and economic instability, unhealthy fetuses, or health issues for the mother. It is nearly a tautology to claim that an unwanted pregnancy is the result of bad moral luck. Of course, sexual desire that is consummated without contraception is not only a matter of bad luck—there is also a matter of

responsibility here (as discussed above); but responsibility is conditioned by a biopolitical framework that is often beyond the control of any individual women (or man). Since abortion is only an option when a pregnancy is unwanted (leaving aside the issue of forced abortion, say in China under the one-child policy), the abortion decision thus arises in a condition of bad luck.

Let's be even more clear about this: no woman, as far as I know, sets out to get pregnant in order to have an abortion. Even in the case of serial abortion, it is doubtful that a woman would seek out a life story that contains a number of unwanted pregnancies followed by a series of abortions. The choice of abortion is not directly intended as something that women want or that women intend as part of a life plan; nor is abortion intended as an optimal opportunity for excellence when initiating the process of sexual activity that could lead to reproduction. Rather, the abortion choice occurs after an unwanted pregnancy occurs as the result of some sort of unintended bad luck: sexual desire is misunderstood or uncontrolled, there is lack of education about reproductive health, birth control fails or is unobtainable, a job or educational opportunity arises, there is a change in economic or family dynamics, there is rape or sexual coercion, a pregnancy results that is dangerous for the mother, or a fetus is conceived that is not healthy or viable, and so on. It would be better if women were not confronted with unwanted pregnancies. The choice of abortion in such circumstance is not optimal because it would be better if pregnancy itself did not occur in those circumstances. But the world is not cooperative and social forces sometimes conspire against us, preventing us from enjoying a good life without tragic choices and bad luck. To say that bad luck is involved absolves women of the kind of guilt and blame that some pro-choice advocates—like Ann Furedi—are keen to eliminate. It also reminds us that the task at hand is to transform the world in a way that changes the circumstances so that there are fewer unwanted pregnancies, better sex education, more virtuous sexual encounters (involving both male and female sexuality), and thus less bad luck with regard to reproduction and fewer tragic abortion choices.

### **ACTIONS THAT ARE PERMISSIBLE BUT NOT OPTIMAL**

The question about whether abortion should be “legal but rare” is related to the more general question of whether there are good reasons to avoid actions that are morally permissible. This may seem an odd question. It might seem that if something is permitted, that's the end of the story. If it is permitted, you can do it. And so moral judgment ends. However, in many situations, there remains substantial need for continued judgment about when and how much of a permitted thing is optimal. And there may be good reasons to not do what is permitted. Virtue ethics directs our attention to the question of optimization of actions, habits, and behaviors within the range of what is permitted. The question is: how much of a permitted action is the right amount? And is it better for there to be more or less of a given permitted action? It might even be that there a number of actions that are permitted but which ought to be avoided entirely, if possible.

For example and by way of analogy consider war and killing in war. We would usually think that it would be better to never have to go to war and that

it would be good to never be faced with the need to kill in war. However, it is possible to imagine that in some circumstances war can be justified. Indeed, the virtue tradition discusses this sort of example at length in relation to the virtue of courage. And the natural law tradition that is often associated with the virtue tradition provides us with an account of the justification of war known as the just war tradition. But even those who speak of the justification of war would likely say that war is a matter of bad luck and that a life spent in peace without the need to go to war would be better.<sup>27</sup> The analogy with abortion is not perfect but it is suggestive.<sup>28</sup> One difference is that defenders of just war usually view going war as morally necessary—and not merely permissible. Defenders of just war also view going to war as heroic and not merely as a tragic result of bad moral luck—even though war is indeed a tragic and sub-optimal outcome.

Pushing the analogy with war a bit further, one wonders whether abortion could also be viewed as morally necessary or heroic. Perhaps there are such cases in circumstances in which a disabled fetus might cause severe suffering for a family and abortion would be a heroic choice, requiring courage and fortitude. We might note in passing here that pacifists argue that the world should be transformed in a way such that the tragic choice of war is no longer necessary. Those who argue that abortion should be “legal but rare” may similarly argue that the world should be transformed in such a way that the tragic choice of abortion is no longer necessary.

But let’s return to the larger issue of the distinction between the question of what is permitted and the question of how we optimize the use of liberty. The question of optimization shows up in a variety of contexts. Sometimes it seems to be a straightforward matter of cost-benefit analysis. Certainly cost-benefit analysis can be used to guide our judgments. But a deeper moral question has to do with the question of human excellence. The question of optimization is not only about costs and benefits in concrete decisions having to do with maximizing pleasure and minimizing pain, it is also about the kind of life we want to live and about the totality of circumstance, habits, and practices that make up an excellent (or virtuous) life. This idea of optimization points us toward the sort of moral reasoning we find in virtue ethics.<sup>29</sup>

There exists an interesting category of actions that present a challenge for moral judgment: those actions that are permitted but which ought to be minimized or avoided. These sorts of actions can be seen in a variety of examples. Consider the following:

1. You are permitted to leave your doors unlocked at night; but it is not prudent to do so.
2. You are permitted to keep all of your wealth and refuse to donate to charity; but it would be nice if you gave to the needy.
3. You are permitted to eat meat; but it would be better if people in general ate less meat.

4. You are permitted to take it easy and enjoy a pleasant life; but it would be better if you cultivated your mind and pursued wisdom and enlightenment.

This list of examples points us to the following considerations, having to do with: (1) prudence, (2) supererogation, (3) utilitarian maximization, and (4) virtue optimization. These are interrelated. But the difference is as follows. Prudential considerations are not explicitly moral—they are about what is wise, smart, or strategic. There may be overlap with moral concerns. For example, the wisdom of locking one's doors (case 1 above) can also be connected to a moral obligation to protect one's loved ones from harm. Supererogation focuses on actions that are not only prudent but are also morally praiseworthy. By definition a supererogatory action is not required, even though it is obviously permitted. And as the above example (2) shows, one is permitted not to perform a supererogatory action. Supererogation goes beyond what duty requires and opens up questions about saintly or superior moral achievement (we will look at this case in more detail below). With regard to utility maximization—in (3) above—we consider trends and habits that point beyond any singular action toward general considerations about behavior. There are a variety of reasons that it would be better if people ate meat that fall short of the claim that it is simply wrong to kill animals for meat. These reasons include claims about prudence: eating lots of meat is unhealthy for individuals and a heavy meat diet will tend to cause pollution and contribute to climate change. There can also be supererogatory reasons to avoid meat eating: ascetic saintliness is often associated with control of the appetites and restrictions on diet. These considerations combine to lead us to the conclusion that in general and for the most part it would be better if people ate less meat. Notice that this conclusion falls short of what a vegan or animal rights perspective might require. The formulation of the claim about reducing meat consumption offered above does not claim that meat eating is wrong—only that it would be better if it were minimized and reduced. Finally, in (4) we get a case of virtue optimization. One is not required to develop one's potentialities. We are not typically blamed for failing to pursue wisdom (as it would be described in the Aristotelian tradition); nor is one typically blamed for failing to pursue enlightenment (as it might be described in Buddhist or Hindu traditions). But there is a sense in which human excellence is to be achieved by cultivating one's potentialities and doing more than what is merely permitted. This case is similar to the case of supererogation; but it is not moral excellence we are speaking of here but rather a kind of excellence that has to do with maximizing one's potential. And, it is important to note, there is a right time and right way to pursue enlightenment. In the middle of a war, it is imprudent to sit and meditate or hide out and read Aristotle. It also seems callous to pursue wisdom when one's neighbors are starving or one's children need care. One must be prudent and moral, even about the pursuit of wisdom and human excellence.

So what does this tell us about abortion and unwanted pregnancy? The meat reduction case (3) is perhaps the case that is most similar to the abortion case under discussion—in which women are permitted to have abortion but it would

be better if there were fewer abortions.<sup>30</sup> This example shows us—as does the discussion of war offered above—that there is a general category of actions that are permitted but which should also be avoided or minimized—i.e., there are a variety of things that are “legal but rare,” permissible but not optimal. Especially when considered from a vantage point that asks about utilitarian maximization, we can understand that to say it would be better if there were fewer abortions means it would be better if there were fewer unwanted pregnancies and if there were a social structure that helped us to achieve this goal. As in the case of meat eating, one would have to change the surrounding social system in order to make it possible to achieve this goal. We need more meat alternatives, for example, in the case of meat eating; and we need greater access to birth control, for example, in the case of abortion.

One might suggest that abortion discussions are also like the case of supererogation (4). There is some talk of “Good Samaritanism” in the abortion literature—for example, in Judith Jarvis Thomson’s famous “Defense of Abortion” article. Pro-life arguments often claim that it would be better for a woman to carry a pregnancy to term and then put the child up for adoption and act as a Good Samaritan to the unborn child. But Thomson’s point is that no one is required to be a Good Samaritan and that when abortion is illegal, women are forced to be Good Samaritans. Completing an unwanted pregnancy is a case of supererogation that is not required. We might also note that judgments about prudence—as in (1) above—are relevant, both in terms of preventing unwanted pregnancies and in terms of the problem of unsafe and unhealthy abortion. For example, it would be unwise for a woman to have a so-called back-alley abortion. Finally, with regard to the issue of virtue optimization—as in case (4)—we might note a parallel with considerations of natality. Reproduction is a human potentiality, similar in importance to the cultivation of wisdom and enlightenment. But, as noted above, there is a right time and manner for cultivating wisdom and enlightenment. There is also a right time and manner for reproduction. And as with the cultivation of wisdom, no one is required to do so—just as no one is required to reproduce; nor should one be blamed for failing to cultivate wisdom or failing to reproduce (or choosing to abort an unwanted pregnancy).

### **CHOICE, MORALITY, LEGALITY, AND INTERSECTIONALITY**

Now there may be a variety of reasons that permitted things should be rare. We should be permitted to choose these things, even though it would be better if this choice was not frequently made. One could provide a basic utilitarian explanation of this idea in terms of maximizing happiness and satisfying the preferences of people. Utilitarian optimization strategies apply with regard to pricing commodities, sin taxes, and the like. Smoking, for example, may be morally permitted; but we might decide as a society that in the interest of public health, a tax should be imposed on tobacco in an effort to discourage smoking, change people’s preferences, and minimize the social costs of tobacco-related disease. One could even imagine a utilitarian defense of the kind of legal regime that has been created in some states where abortion is legal but in which there are large barriers erected

that make it difficult for women to obtain abortion. But the conversation about “legal but rare” abortion is not usually connected to that sort of obstructionist strategy, which is often mounted as an incremental approach used by those who are completely opposed to abortion.

So let me stipulate that the approach I am considering here is not focused on creating restrictions on liberty that seek to manipulate costs and benefits in order to prevent women from being able to access abortion. Nor am I arguing on strictly utilitarian grounds. Rather, my effort here is to consider how to make sense of the idea that an individual should be encouraged to take steps to avoid or minimize some behavior that she is morally permitted to do. As I’ve stated, the normative theory that gives us the best insight into the issue is virtue theory. Virtue theory is not merely interested in what is permissible; it is also interested in how we cultivate excellence and optimize human potential. When we say that something is permitted, we draw a line that distinguishes between what we have a right to do and what it would be wrong to do. We are free to do things that are not wrong (or that do not violate the rights of others). But within the permissions granted by a general account of liberty and rights, it is still possible to ask about what is excellent and how to realize our potential. Virtue theory asks us, on this way of understanding it, how to optimize freedom or, said differently, how best to exercise our rights.

Virtue theory is also interested in the surrounding social circumstances. But unlike utilitarian theories which focus on manipulating costs and benefits, virtue theory focuses on moral education and support structures that help us achieve excellence and eudaimonia. To say that it would be better for a woman not to have an early term abortion and that it would be better if there were fewer early term abortions does not mean that women who choose to have early term abortions are wrong to do so. Nor does it mean that they should feel guilty for having an abortion—since they have done nothing wrong. Nor does it mean—on the virtue theoretical account—that social policy should be manipulated in order to discourage pregnant women from terminating unwanted pregnancies. By the time a woman is pregnant with an unwanted child, significant opportunities for optimization have already passed.

My point here is thus not to blame women for doing what is permissible. Rather, the implication of my argument points us toward the need for greater support for women such that it is easier for them optimize their freedom and avoid unwanted pregnancies. This means that the abortion discussion needs to be expanded to consider better access to birth control, a better system for regulating male and female sexual desire, better defenses against sexual coercion and violence, and better education and more economic and educational opportunities for women. These sorts of considerations make sense when one approaches this topic—or any other topic—from the perspective of virtue theory and biopolitics.<sup>31</sup> Virtue theory is interested in the social, economic, and political circumstances that help or hinder the pursuit of excellence; the lens of biopolitics shows us how power relations structure those circumstances. We need to consider the role of moral luck and the vicissitudes of circumstance, as well as the way that choice is constructed in social and political life.

Plato and Aristotle tell us that it would better to be born into a just society, which will support us in pursuit of virtue. In the ancient world it was possible to imagine a kind of legal perfectionism such as we find in Plato's dream of a republic ruled by the philosopher-king. In that utopia, the state would support us in pursuit of virtue by making it difficult for us to be corrupted: thus Plato bans the poets and sets up the hierarchical rule of the philosopher-king. But modern legal and moral theories reject this idea, since a state that aimed at perfecting human nature would end up violating individual liberty and freedom of choice: the Platonic state would force us to be virtuous and would not be averse to censorship, authoritarian education, and so on.

Modern liberal political theory affirms liberty and wants to avoid patronizing law—even though modern states do engage in the sorts of utilitarian manipulations of costs and benefits mentioned above with regard to sin taxes and the like. The idea of being “pro-choice” only makes sense within a modern liberal democratic regime. But even then, structures of power determine who gets to choose what, within normative constraints imposed by biopower. Rich white women have more choices than poor black women, for example. Women in patriarchal cultures in the developing world have a different relationship to reproduction and abortion than do women in the Anglo-European world. Women with access to birth control have more choices than women without healthcare or adequate sex education. And so on. Thus liberal legal theory must be supplemented by transformative critical theory and intersectional analysis.

While we can distinguish between moral permissibility and legal permissibility, we also have to include social reality and intersectional analysis in thinking about the idea of “legal but rare.” At issue here is a question in the philosophy of law. Is the law supposed to track morality? A kind of perfectionism and paternalism in the law aims for a close connection between the law and morality. But a more liberal or libertarian approach to law will want there to be extensive permission for moral disagreement. This distinction plays out in the abortion debate in thinking about the idea of “legal but rare.” The legal permissibility of the abortion choice is typically grounded upon some claim about the right to privacy or right to conscience (as in *Roe v. Wade*, to cite the most famous example). But this grounding can be agreed to by people who disagree about the morality of abortion itself. A liberal position about abortion would be pro-choice in the sense that people would be allowed to choose according to the dictates of their own best judgment. This results in a situation that is familiar from discussions of legal toleration, where people can agree to a basic legal right for people to pursue goods that are not all viewed as appropriate on moral grounds. But as critics of toleration have noted, structural inequalities and intersectional issues arise with regard to who is tolerated and who does the tolerating.

The claim that abortion should be “legal but rare” thus rests upon a liberal or pro-choice claim about legal permissibility. But it might seem to point in the direction of perfectionism. This is likely why critics of the idea such as Furedi are not fond of the idea. A radical pro-choice position wants to assert that abortion should be legal—full stop. Such an ardent defender of choice is reluctant to open the door to the question of whether abortion is optimal. This reluctance is

grounded in a recognition of the dangers of perfectionism: when we start “legislating morality” as the saying goes, we can end up violating liberty.

In order to avoid a kind of creeping perfectionism one must carefully qualify what one means when one says that abortion should be a legal choice but that it would better if it were rarely chosen. One must begin by asserting the permissibility of early term abortion (i.e., by admitting that early term abortion is not wrong) in terms of some account of the ontological status of the fetus and also in terms of the right to privacy of the mother. But the discussion of optimization that aims at making abortion rare, as I am reconstructing it here, is not about the fact that early-term abortion is wrong; rather it is about the fact that the totality of circumstances that lead to the early-term abortion choice are sub-optimal. Or to use the language of moral luck, the point is this: although abortion is a morally permissible choice, it is bad luck that a woman has an unwanted pregnancy that confronts her with the choice of abortion in the first place. That bad luck must also be analyzed from the vantage point of biopolitical power, feminism, and intersectionality.

Let me reiterate two points about the importance of choice here to be clear. First, in a liberal political system, there should be free choice about issues such as abortion that are morally disputed and in which the right to privacy allows for disagreement under a regime of toleration. Liberty of conscience and the right to privacy are fundamental here. A liberal regime that is impartial and neutral among what Rawls calls comprehensive schemes ought to allow for different choices with regard to abortion. No one is forced to choose abortion; nor should the abortion choice be prohibited. But the second point has to do with the social (and political) circumstances that lead up to the choice of an abortion. And this takes us beyond the considerations of political liberalism. In many cases this involves sub-optimal and tragic circumstances involving sexual coercion, ignorance, failed birth control, and the like. The solution is not to restrict the abortion choice but to empower women so that the choice is less likely to arise. And that requires us to think critically about the ways that biopower influences our understanding of natality, reproduction, sex, and gender.

## **SUPEREROGATION AGAIN**

Before concluding, let’s look a bit deeper at supererogation, since this shows up in important discussions of abortion ethics, as we will see in this section. We saw above that the issue of supererogation comes up when we distinguish between what is permitted and what is optimal. In other words, some actions may be morally permitted, which implies that these are not wrong; but there may be other actions that are superior or optimal. This distinction shows up in discussions of supererogation. In case 2 that was mentioned above, we see this distinction: “You are permitted to keep all of your wealth and refuse to donate to charity; but it would be better if you gave to the needy.” For the sake of argument, let’s assume here that you are not required to give money to charity and that you do nothing wrong when you do not donate. It would still be better to be a Good Samaritan and give your money to charity. Singer has argued that such “charity” is obliga-

tory and not merely supererogatory.<sup>32</sup> The present paper is not about charity but about abortion, so let's leave this aside as an open question—about what is obligatory and about what global utilitarianism requires (although we'll pick up this thread in a moment). Translated back into the issue of abortion, however, the question becomes this: assuming that abortion is permitted in the case of an unwanted and unplanned pregnancy, is it supererogatory of a woman to carry the pregnancy to term?

It is easy to imagine someone arguing that it is nice, saintly, or supererogatory to carry an unwanted fetus to term. Thomson raises this issue when she considers the way that the prohibition on abortion forces women to be Good Samaritans. She says, "women are compelled by law to be not merely Minimally Decent Samaritans, but Good Samaritans to unborn persons inside them."<sup>33</sup> This idea has been criticized since Thomson first stated it—beginning with John Finnis's response to Thomson published in 1973.<sup>34</sup> Finnis's point—and the point of others who criticize Thomson is that pregnancy is not a circumstance in which ordinary thinking about supererogation applies—since pregnancy is a natural, normal process that does not require supererogation. On the other hand, David Boonin has devoted substantial effort to defending Thomson's argument and the claim that abortion can be understood in the context of Good Samaritanism.<sup>35</sup>

But let's point out that supererogation is not what is at issue in thinking about the idea of abortion as "legal but rare." To say that abortion should be legal but rare is not to say that those women who choose to carry unwanted fetuses to term are saints. They might be. They might also be forced to make that decision or afraid of the consequences of having an abortion. But the question of their saintliness is a different question than the question of what we might do to make abortion rare. Obviously one way to make abortion rare would be for women to be saints who carry even unwanted fetuses to term. Another way to make abortion rare would be to frighten women by either threatening social stigma or by spreading disinformation about the physical and psychological effects of abortion. But neither of these are what is typically meant by those who advocate the idea of "legal but rare." The primary focal point of my discussion here—and of those politicians who speak of abortion being legal but rare—is to find ways to make unwanted and unintended pregnancies rare that do not require women to be saintly and which do not coerce women into avoiding abortion.

The way to do this, as I have suggested above, is to transform the biopolitical world such that women are confronted with fewer unwanted pregnancies: by better education, by improving our understanding of male and female sexual desire, by reducing coercive sexual relationships, by providing access to contraception, by providing substantial social support for pregnancy and childcare, and so on. Said differently, if there is a place for discussions of supererogation in the abortion discussion it seems that it should not be focused on a pregnant woman's choice to be a moral saint in carrying an unwanted pregnancy. Rather, it should be focused on the surrounding social world: what is required is more support for women in general and pregnant women in particular. This means that we should all treat women better. Now this may not really be a case of supererogation (insofar as women deserve better treatment as a matter of basic decency). But the

sorts of changes imagined—changes that would make abortion rare—would be substantial and might be viewed by some as “supererogatory,” as requiring us to go above and beyond our ordinary treatment of women and providing them with something better than the ordinary standard of minimal decency.

Let’s return at this point to Peter Singer’s reconceptualized understanding of poverty alleviation. Singer is basically arguing that in order to really alleviate global poverty we need to radically change our understanding of affluence and the social systems that contribute to ongoing inequality. The same point must be made with regard to “abortion alleviation,” as we might call the idea of reducing the number of abortions. What is needed is a new way understanding our obligation to support women.

## CONCLUSION

Perhaps we are making progress as abortion rates decline. We seem to be doing better at supporting women. But more work needs to be done. Abortion should remain legal but we need to work on the biopolitical structures that continue to allow unwanted pregnancies to happen. To make abortion legal but rare we need to think carefully about male and female sexual desire, about natality, about the virtue of reproduction and childrearing, and about obstacles to flourishing that are exposed by feminist intersectional analysis and by a transformative critical theory of biopower. Far from stigmatizing women, the goal of making abortion legal but rare should be understood as part of the general effort to empower women, foster reproductive health, and reduce the number of unwanted pregnancies.

## ENDNOTES

1. The standard set by *Roe v. Wade* permits early (first trimester) abortion. Subsequent case law (*Casey*, *Webster*, etc.) has pointed toward a dividing line associated with the issue of fetal viability, which occurs well after 20 weeks, which helps date “late term” abortions. But for the sake of argument here, I am only focusing here on “early term” abortions, which will be defined for the sake of simplicity as first trimester abortions. The philosophical scholarship on abortion presents challenges with regard to the ontological and moral status of the fetus. There is a developmental continuum during pregnancy during which the status of the fetus evolves. Some pro-choice authors—Mary Anne Warren, for example—claim that this developmental continuum extends after birth, thus asking us to think about the moral permissibility of infanticide as well. But late term abortions remain morally problematic, as the fetus’s brain development proceeds and as development approaches the point of viability (the ability to live outside of the womb). On the other hand, pro-life or anti-abortion authors will claim that life begins at conception, meaning that the fetus is a moral patient (or said more strongly a human person with a right to life) at conception. This paper assumes for the sake of argument that the “life begins at conception” view is wrong and that early term abortions are morally permissible—basing this assumption on the legal standard and on the work of authors such as Warren, Thomson, Tooley, Brody, and Marquis. See Judith Jarvis Thomson, “A Defense of Abortion” *Philosophy and Public Affairs* 1.1 (1971): 47–66; Mary Anne Warren, “On the Moral and Legal Status of Abortion” *The Monist* 57.1 (1973): 43–61; Mary Anne Warren, *Moral Status: Obligations to Persons and*

*Other Living Things* (New York: Oxford University Press, 1997); Baruch Brody, "Thomson on Abortion" *Philosophy & Public Affairs* 2.3 (1972): 335–40; Don Marquis, "Why Abortion Is Immoral," *The Journal of Philosophy* 86.4 (1989): 183–202; Michael Tooley, "Abortion and Infanticide," *Philosophy and Public Affairs* 2.1 (1972): 37–65. For a recent overview of the abortion literature in philosophy see James Edwin Mahon, "Abortion and the Right to Not Be Pregnant," in *Philosophy and Political Engagement*, ed. Allyn Fives and Keith Breen (New York: Palgrave MacMillan, 2016), chapter 4.

2. According to Gallup, 60 percent of Americans think that *Roe v. Wade* should not be overturned (<https://news.gallup.com/poll/1576/abortion.aspx>, June 2019 data, accessed August 26, 2019). Another poll from NPR/PBS Newshour/Marist found that 77 percent of Americans think *Roe* should not be overturned, while 59 percent of Americans oppose laws that ban early abortion (<https://www.npr.org/2019/06/07/730758875/poll-shows-most-americans-support-abortion-rights-but-with-some-limitations>).

3. Ziad Munson writes "Many people are surprised to learn that abortion was neither illegal nor rare in early American history" (Munson, *Abortion Politics* [Cambridge: Polity Press, 2018], 12).

4. Bill Clinton, Acceptance Speech at Democratic National Convention, August 29, 1996 in *Public Papers of the Presidents of the United States, William J. Clinton, July 1 to December 31, 1996, Book 2* (Government Printing Office, 1998), 1415.

5. "Clinton Opens Debate on Family Planning," *New York Times*, June 14, 2006, <http://www.nytimes.com/2006/06/14/nyregion/14hillary.html>.

6. "Obama Tells Pope He Wants Fewer Abortion," *CBS News*, July 10, 2009, [http://www.cbsnews.com/8301-503544\\_162-5149648-503544.html](http://www.cbsnews.com/8301-503544_162-5149648-503544.html); "Obama Questioned on Abortion, Why He Is a Christian," CNN, September 10, 2010, [http://articles.cnn.com/2010-09-28/politics/obama.tough.question\\_1\\_late-term-abortion-abortion-debate-president-barack-obama?\\_s=PM:POLITICS](http://articles.cnn.com/2010-09-28/politics/obama.tough.question_1_late-term-abortion-abortion-debate-president-barack-obama?_s=PM:POLITICS).

7. Warren, "On the Moral and Legal Status of Abortion," 59.

8. Thomson, "A Defense of Abortion," 65–6. Admittedly, Thomson is speaking here of late-term abortion. But her claim about "indecency" pushes us beyond permissibility to another form of moral judgment and we might claim that even though abortion is permitted there is something "indecent" about the rate of abortion.

9. For suggestive discussions of abortion and tragedy see Leslie Cannold, *The Abortion Myth: Feminism, Morality, and the Hard Choices Women Make* (Middletown, CT: Wesleyan University Press, 2000); Eric M. Rovie, "Abortion: Approaches from Virtue," *Auslegung: A Journal of Philosophy* 25.2 (Summer/Fall, 2002): 137–50. For an influential account that focuses on virtue see Rosalind Hursthouse, "Virtue Theory and Abortion," *Philosophy and Public Affairs* 20.3 (1991): 223–46.

10. The so-called "responsibility objection" has been widely discussed in the literature beginning at least with Harry Silverstein, "On a Woman's Responsibility for the Fetus," *Social Theory and Practice* 13.1 (1987): 103–19. For a comprehensive and more recent account see Ian McDaniel, "The Responsibility Objection to Abortion: Rejecting the Notion that the Responsibility Objection Successfully Refutes a Woman's Right to Choose," *Bioethics* 29.4 (2015): 291–9.

11. "The number of abortions increased after the procedure was made legal (in 1973), peaking at 1.6 million in 1990. Since then, abortions have been declining, measured both as an absolute number and as a percentage of women of childbearing age who have them. (Nevertheless, it is beginning to look as if the number of abortions has stabilized at between 1.0 and 1.3 million a year.)" (Ian Lague and Ronald Munson, *Intervention and Reflection: Basic Issues in Bioethics*, 10th Edition [Cengage Learning, 2017], 444).

12. There have been numerous attempts to regulate abortion out of existence by mandating requirements about clinic size and so on. Such draconian regulations could contribute to the declining abortion rate. But, obviously for those who claim abortion should be “legal but rare” this is not the right approach—since draconian regulation makes it harder to obtain a legal abortion.

13. We might note that these two words are sexually loaded and often gendered. Indecency often comes up in thinking about sexual ethics; and the word “wanton” often has strong sexual connotations. Indeed, the word is often applied only to women—as in the phrase “wanton women.” It might be surprising that Thomson and Warren employ these terms—although this points us toward the need for further feminist critique of our moral vocabulary.

14. See Andrew Fiala, *Transformative Pacifism* (London: Bloomsbury, 2018).

15. Ann Furedi, *The Moral Case for Abortion* (New York: Palgrave MacMillan, 2016), 29. Also see Katha Pollitt, *Pro: Reclaiming Abortion Rights* (New York: Picador, 2014).

16. Hannah Arendt, *The Human Condition* (University of Chicago Press, 1998); see Rosalyn Diprose and Ewa Plonowska Ziarek, *Arendt, Natality and Biopolitics: Toward Democratic Plurality and Reproductive Justice* (Edinburgh University Press, 2018); also see Anne O’Byrne, *Natality and Finitude* (Indiana University Press, 2010).

17. For related set of issues that use the lens of biopolitics see articles collected in Silvia Camporesi, ed., “Bioethics and Biopolitics: Presents and Futures of Reproduction,” *Journal of Bioethical Inquiry* 14.2 (2017).

18. For connections between Aristotle and feminism see Sarah Borden Sharkey, *An Aristotelian Feminism* (Springer International, 2016). Sharkey points out that Martha Nussbaum’s capabilities approach can be understood as a kind of Aristotelian feminism. Also see Marilyn Friedman, “Feminist Virtue Ethics, Happiness, and Moral Luck,” *Hypatia*, 24.1 (2009): 29–40.

19. See Leandra Hinojosa Hernández and Sarah De Los Santos Upton, *Challenging Reproductive Control and Gendered Violence in the Américas* (Lanham, MD: Rowman and Littlefield, 2018).

20. See Neil Levy, “Foucault as Virtue Ethicist,” *Foucault Studies* 1 (Dec. 2004): 20–31.

21. Hilde Lindemann, “. . . But I Could Never Have One’: The Abortion Intuition and Moral Luck,” *Hypatia* 24.1 (2009): 41–55, at 42.

22. Some of this work is collected in Daniel Statman, ed., *Moral Luck* (Albany, NY: State University of New York Press, 1993): Thomas Nagel, “Moral Luck,” in Statman, 57–71; Margaret Urban Walker, “Moral Luck and the Virtues of Impure Agency,” in Statman, 235–50; Bernard Williams, “Moral Luck,” in Statman, 35–55. Claudia Card’s account is found in Card, *The Unnatural Lottery: Character and Moral Luck* (Philadelphia: Temple University Press, 1996).

23. The growing literature on virtue ethics cannot be adequately covered in a footnote. But a good bibliography and general overview can be found here at Rosalind Hursthouse and Glen Pettigrove, “Virtue Ethics,” in *The Stanford Encyclopedia of Philosophy* (Winter 2018 Edition), <https://plato.stanford.edu/archives/win2018/entries/ethics-virtue/>.

24. See Silverstein, “On a Woman’s Responsibility for the Fetus,” or McDaniel, “The Responsibility Objection to Abortion.”

25. See Card, *The Unnatural Lottery*, 49 or 97.

26. For the “life begins at conception” idea see for example, Patrick Lee and Robert P. George, “The Wrong of Abortion,” reprinted in Lague and Munson, *Intervention and Reflection: Basic Issues in Bioethics*, chapter 5.

27. For a relevant discussion see David K. Chan, *Beyond Just War: A Virtue Ethics Approach* (Palgrave Macmillan, 2012).

28. Lloyd Steffen offers a related account of the connections between just war thinking and abortion in Lloyd Steffen, *Ethics and Experience: Moral Theory from Just War to Abortion* (Lanham, MD: Rowman and Littlefield, 2012), chapter 8.

29. On the idea of optimization and its connection with virtue ethics see Thomas Hurka, *Virtue, Vice, and Value* (Oxford University Press, 2001), chapter 3. Hurka considers this in the context of the question of “degrees of virtue and vice.”

30. Assuming, of course, that there is no prima facie duty not to eat meat—an assumption that vegans and animal welfare and rights advocates assert. There are other suggestive connections between animal welfare and abortion. But leaving this aside, I adopt without further consideration here the mainstream view that meat eating is permissible.

31. Others have offered a similar approach, which has influenced the argument made here. See Hurshouse, “Virtue Theory and Abortion”; Bertha Alvarez Manninen, “The Value of Choice and the Choice to Value: Expanding the Discussion about Fetal Life within Prochoice Advocacy” *Hypatia* 28.3 (Summer 2013): 663–83.

32. The natural law tradition provides one such argument with Thomas Aquinas arguing, for example, that the rich have an obligation to give to the poor. Peter Singer’s utilitarian idea about the need for the affluent to care for the poor provides another argument against this claim. See Peter Singer, “Famine Affluence, and Morality,” *Philosophy and Public Affairs* 1.3 (Spring 1972): 229–243; and Singer, *The Life You Can Save* (New York: Random House, 2009). For the sake of argument here, however, I assert the claim that one does nothing wrong in not giving to charity. The goal is then to understand the idea of supererogation.

33. Thomson, “A Defense of Abortion,” 63.

34. John Finnis, “The Rights and Wrongs of Abortion: A Reply to Judith Thomson,” *Philosophy and Public Affairs* 2.2 (1973): 117–45.

35. David Boonin, *A Defense of Abortion* (Cambridge: Cambridge University Press, 2003).